

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2898

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROBERT PRIHODA,

Plaintiff-Appellant,

v.

JOHN HUSZ,

Defendant-Respondent.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert Prihoda appeals a trial court order that (1) upheld a decision of the Parole Commission denying him discretionary parole under § 304.06(1r)(a), STATS., and (2) dismissed Prihoda's 42 U.S.C. § 1983 lawsuit alleging the Commission's decision denied him due process. On remand from this court, the Commission has issued a supplementary explanation why it denied Prihoda parole, notwithstanding the fact that he had earned his GED degree or equivalent while in prison. We must uphold the

Commission's decision if it kept within its jurisdiction, if it acted nonarbitrarily, nonoppressively, and according to law, and if it had evidence reasonably supporting its decision. *State ex rel. Hansen v. Dane County Cir. Ct.*, 181 Wis.2d 993, 998-99, 513 N.W.2d 139, 142 (Ct. App. 1994). We conclude that the Commission's decision met these standards. We therefore reject Prihoda's arguments and affirm the trial court order.

Under § 304.06(1r)(a), STATS., GED earners presumptively deserve release unless "overriding considerations" exist. Here, the Commission has cited several overriding considerations – Prihoda's dangerousness, the seriousness of his crimes, the risk he posed to the public, and the length of time he had already served. Since August 17, 1975, with the exception of three years when he escaped, Prihoda has been serving a life term for one count of first-degree murder of an off duty policeman as a party to the crime, and a forty-year consecutive term for four counts of armed and masked robbery as a party to the crime. Prihoda had threatened someone with a dangerous weapon in connection with the armed and masked robbery counts. Prihoda later received an additional eighteen-month consecutive sentence for escape and has at least one prior conviction for robbery. These offenses were extremely serious and highly indicative of dangerousness. Further, Prihoda has served only a relatively small portion of his life term plus forty-one and one-half years. Taken together, these factors were sufficient to override the fact that Prihoda earned a GED degree in prison. As a result, the Commission could reasonably determine that Prihoda's GED degree, despite its associated presumption favoring release, fell short of requiring discretionary parole in this instance.

We also uphold the trial court's dismissal of Prihoda's due process based § 1983 claim. While inmates sometimes have due process liberty interests in discretionary parole release, *see Board of Pardons v. Allen*, 482 U.S. 369, 377-81 (1987), we need not reach that issue in this appeal. Even if we assume that such a liberty interest arose here, Prihoda has not shown that the Commission denied him due process. In his reply brief, Prihoda has narrowed his due process allegation to a claim that the Commission denied him substantive due process. Inasmuch as Prihoda does not dispute the material facts and these facts reasonably supported the Commission's decision, we see no arguable basis to Prihoda's substantive due process based § 1983 claim. Unless Prihoda could show that the Commission evaluated the facts in a wholly inadequate way, Prihoda could not demonstrate a substantive due process violation. Prihoda has made no such showing.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.